

THE ONTARIO HUMAN RIGHTS CODE, S.O. 1961-62, c. 93,
as amended

IN THE MATTER OF the complaint made by Mr. M. Penniecook
against Mr. and Mrs. Kalle Kilu alleging that they committed
a breach of section 3 of the Ontario Human Rights Code by
denying him occupancy of living accommodations.

BOARD OF INQUIRY

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PROF. W. S. TARNOPOLSKY

Submitted: July 13th, 1970.

IN THE MATTER OF the Ontario Human Rights Code, S.O.
1961-62, c. 93, as amended by S.O. 1965, c. 85, S.O. 1967,
c. 66, S.O. 1968, c. 85, and S.O. 1968-69, c.00;

- AND -

IN THE MATTER OF the complaint made by Mr. M. Penniecook
against Mr. and Mrs. Kalle Kilu alleging that they committed
a breach of section 3 of the said Act by denying him occupancy
of living accommodations;

- AND -

IN THE MATTER OF a Board of Inquiry appointed under section 13
of the Ontario Human Rights Code, to conduct a hearing to
inquire into this complaint.

BOARD OF INQUIRY

- PROF. W. S. TARNOPOLSKY

APPEARANCES:

Mr. Frank G. Harrington, Q.C. - Counsel for the Commission
Mr. Sidney B. Linden - Counsel for the Respondents

TO THE ONTARIO HUMAN RIGHTS COMMISSION and to the Honourable
Dalton Bales, Minister of Labour of the Province of Ontario:

GENTLEMEN:

On the twenty-second day of January, A.D., 1970, I was
appointed a Board of Inquiry to inquire into the above-mentioned

complaint and to report to the Ontario Human Rights Commission in accordance with Section 13 of the Ontario Human Rights Code.

The Hearings into this complaint were all held in Room 440, Main Parliament Buildings, Queen's Park, Toronto. They commenced on Tuesday, May 19th, at 2:00 p.m. By the conclusion of the day's hearings the Commission had completed its case and Mr. Linden, Counsel for the Respondents, urged the Board of Inquiry to dismiss the complaint on the basis that there was insufficient evidence in support of the allegation to conclude that an act in breach of the Code had been committed. I agreed to review the evidence and to give my decision the following day.

At the opening of the Inquiry on the day following, and after a brief review of the evidence to that point, I indicated my conclusion that there was at least a prime facie case substantiating the complaint. Upon the rendering of this decision, Mr. Linden proceeded to call his witnesses. Following the evidence by witnesses called on behalf of the Respondents, Mr. Dobson, the Human Rights Officer involved in this complaint, was recalled to testify with respect to certain specific events raised in the testimony of the female Respondent. At the conclusion of the afternoon's hearings, it was agreed to adjourn to the following day for the final arguments by Counsel on behalf of the parties in this hearing. These were presented by both Counsel on the afternoon of Thursday, May 21st.

* * * * *

Upon consideration of the evidence presented to me I find the facts to be as follows:

On the afternoon of November 4th, 1969, while visiting his clients, the Complainant bought a copy of the Toronto Star and saw an advertisement therein under the heading, Rooms to Let: Furnished:

"At Bloor-Spadina, newly decorated room and kitchen, 923 - 1560."

He telephoned the number listed, and spoke to a man. He testified that the man's voice was very similar to the voice of the Respondent, Mr. Kilu. Upon ascertaining that the premises were still available, he was told that the address was "76 Madison Avenue". He then asked for directions to Madison Avenue from the point at which he was telephoning, which was between Manning and College. He was given instructions that the location was on the first street before Spadina going east on Bloor. It was pointed out to him that it was a one-way street going south and so it could not be entered from Bloor Street.

The Complainant arrived at the premises, and was met by the Respondent, Mr. Kilu. Mr. Penniecook informed Mr. Kilu that he was the one who had been speaking to Mr. Kilu on the telephone in connection with the accommodation for rent. Mr. Kilu's reply was, "It's gone, it's gone." Mr. Penniecook tried to protest by explaining that he had been talking to Mr. Kilu only a few minutes before and that he had received from him directions as to how to come to the place. He asked "How come it is gone?" Mr. Kilu's reply was, "It's rented, it's rented." At the same time, Mr. Kilu gestured to Mr. Penniecook in such a way as to indicate that he was ushering him away.

Mr. Penniecook then left and went on to his next business appointment. Meanwhile, he testified, thinking that it could not have been possible during the short lapse of time between the initial telephone call and the meeting at the door for the premises to be rented, he decided to visit a client-friend, and asked for permission to use her telephone. He again called the number which had been listed in the advertisement, and said, "I am calling about the advertisement in the Star for a furnished room and kitchen. Is it still available?" He was told "yes." In Mr. Penniecook's opinion, the voice on the telephone was that of the man who spoke to him previously and who met him at the door. However, Mr. Penniecook did not indicate that he was the same person who had telephoned previously and who had visited the house. Instead, he turned to Mrs. Henry in some apparent frustration and described briefly that he had been informed on the telephone that the accommodation was available, but had been told it was rented when he appeared at the premises.

At this point Mrs. Henry offered to ring the telephone number and see if it was so. According to her testimony, the conversation, after initial salutation, was very brief and ran somewhat as follows:

"Have you got a room renting?"

"Yes."

"Do you rent to black people?"

"No."

"Okay, thank you."

At this point, Mrs. Henry hung up.

Apparently, then, all that Mrs. Henry heard the person



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at the other end of the line say were the three words: "Hello", "Yes", and "No".

These are all the pertinent events that occurred in connection with the complaint. The question that I have to determine is whether the refusal at the door to rent to Mr. Penniecook constituted a breach of Section 3 of the Ontario Human Rights Code.

Section 3 reads as follows:

3. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,

(a) deny to any person or class of persons occupancy of any commercial unit or any self-contained dwelling unit; or

(b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any self-contained dwelling unit,

because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons.

The evidence we have is that Mr. Penniecook was informed, a short while before his arrival at the premises, that they were still available. Upon his arrival he was informed that the premises were rented; gone. Subsequently, both Mr. Penniecook and Mrs. Henry were told over the telephone that the premises were still available. On the next morning, i.e. November 5th, a Human Rights Officer, Mr. Paul Dobson, telephoned inquiring about the premises and was informed that they were still available.

* * * * *

One of the difficulties facing an investigating officer on behalf of the Ontario Human Rights Commission, and a difficulty which faces a Board of Inquiry, is that unless there is an admission that accommodation has been denied for reasons prohibited under the Ontario Human Rights Code, these reasons have to be deduced from surrounding circumstances. It might be useful, therefore, to consider those facts which would lead inexorably to the inference that an act of discrimination had occurred.

May I emphasize that I do not believe that the proof required would be the criminal burden of proof, i.e. beyond a reasonable doubt, but merely a preponderance of evidence. Nevertheless, as was argued by Mr. Linden on behalf of the Respondents, there must be sufficient evidence which, if uncontradicted, would lead one rationally to conclude that an act of discrimination had occurred.

On the basis of the testimony at the hearing, there was certainly some evidence that while Mr. Penniecook inquired about the premises on the telephone, when his skin colour and features could not be seen, he was told that the premises were available. However, when he arrived at these premises and his skin colour and features could be observed, he was told that the accommodation was not available. Also, when Mrs. Henry called the telephone number listed in the advertisement, she was told the premises were available. When she asked: "Do you rent to coloured people?" she was informed "No."

Some considerable time was spent by both counsel to establish the time of Mr. Penniecook's arrival at 76 Madison Avenue. As far as I could gather, and having reviewed the

arguments of both counsel, the only relevance of this was as to whether or not Mr. Kilu could see Mr. Penniecook sufficiently to distinguish the colour of his skin and his appearance. Although there seems to be a wide discrepancy between the testimony of Mr. Penniecook and Mr. Kilu as to the time of their meeting at 76 Madison Avenue, i.e., around 4 o'clock, and around 6 o'clock respectively, there seems to be no question but that it was light enough for Mr. Kilu to see that Mr. Penniecook was not "a white man". This is sufficiently clear from Mr. Kilu's testimony on pages 93 and 94 of the transcript in which Mr. Kilu stated that both Mr. Penniecook and "a white man" were told that the rooms were rented, when in fact they were not. Mr. Kilu's counsel asked the following question: "But of the two people that came, one was black, Mr. Penniecook, and one was white; is that right?" Answer: "Yes." Moreover, at no time did Mr. Kilu state, nor was it claimed on his part, that he was unaware of Mr. Penniecook's colour and facial features. Therefore, it is not necessary for me to consider further how light or dark it was at the time when Mr. Penniecook arrived at the Kilu residence. I repeat it was light enough to observe skin colour and facial features.

The evidence which could lead one to believe that Mr. Kilu was motivated by reasons which are forbidden by Section 3 of the Ontario Human Rights Code may be summarized in the following points:

(a) In response to a request from Mr. Dobson during his investigation, a receipt was presented which indicated that the premises were rented from November 5th on. This, plus the testimony with respect to the telephone conversations with Mr.

Penniecook, Mrs. Henry, and Mr. Dobson, all subsequent to the time when Mr. Penniecook came to the premises, indicate that at that time, i.e., when Mr. Penniecook met Mr. Kilu at 76 Madison Avenue, the premises were not in fact rented.

(b) In answer to Mrs. Henry, someone at 76 Madison Avenue, the premises in issue here, gave the answer "No" when Mrs. Henry asked: "Do you rent to black people?"

(c) During Mr. Dobson's investigation he was informed that Mr. Kilu did not rent to single men, and that for this reason he was reluctant to rent to Mr. Penniecook. In fact, when Mr. Kilu told Mr. Penniecook that the premises were "gone", he did not ascertain whether Mr. Penniecook was married or single. I would suggest that this could not have been a genuine explanation for the denial of the accommodation to Mr. Penniecook.

Let us examine each of these in turn in the light of the evidence submitted by the two Respondents themselves, and other witnesses on their behalf.

* * * * *

(a) The explanation given by Mr. Kilu for telling Mr. Penniecook that the rooms were rented was that someone else had inquired about them and wanted them held pending a visit by his wife to view the premises. But, said Mr. Kilu, when the wife did view them later that evening, she apparently did not like the accommodation, and so the couple failed to take it. The explanation given by Mr. Kilu, Jr., was that it was standard practice for his parents, and for him on their behalf, to say that the accommodation was available when responding to a telephone inquiry, even if someone in the meantime had indicated an interest. However, in these same circumstances,

when a person actually came to the door, he would be told that the place was gone if sufficient previous interest, even without a deposit, had been indicated. The reasons given for this practice were that only a small percentage of those who had inquired on the telephone actually came to view the premises, and it did not pay to turn them away until there had been a firm commitment to rent. Also, because of the language difficulties of the Respondents, this practice was easier than attempting detailed explanations in English.

I must say that ^{this} sort of practice would lead most reasonable people, in circumstances similar to those of this complaint, to believe that the motive was in fact a discriminatory one. However, I must hold that the testimony was not contradicted and particularly in the light of the language difficulty of the Respondents, it could be believable. At the very least, with the explanation provided, I cannot conclude without considering other factors, that the motive for the contradictory information provided to Mr. Penniecook was a discriminatory one.

(b) Again, the testimony of Mrs. Henry, if one could accept that the person she spoke to was Mr. Kilu, and if one could make the further assumption that he understood her perfectly, would lead one to conclude that a discriminatory policy had been shown. However, apart from the fact that the telephone number called was the one listed for 76 Madison Avenue, the only other evidence provided is that the voice at the other end seemed to be that of a person not born and raised in Canada. And even this was assumed on the basis of merely three words in reply to Mrs. Henry's questions. An

explanation was provided by several witnesses on behalf of the Respondents that a tenant with "a foreign accent" was answering the telephone on that day. Moreover, the premises at 74-76 Madison Avenue were occupied by a large number of tenants. Any one of these could have answered. It is possible that a tenant could be motivated to interfere, even to the extent of saying "No" to a question: "Do you rent to coloured people?" Since the evidence is at best tenuously circumstantial, and since Mr. Kilu directly denied having made the statement, I must conclude that the evidence is not sufficient to implicate Mr. Kilu. To make the further supposition that even if it were Mr. Kilu, he understood sufficiently the purport of Mrs. Henry's questions, is further than the evidence can possibly be interpreted.

(c) I believe that the activities of Mr. and Mrs. Kilu in connection with Mr. Dobson on the day following the Penniecook incident, do not provide me with sufficiently cogent evidence to substantiate the allegation of a discriminatory reason for denying the accommodation to Mr. Penniecook.

In the circumstances, it is possible to understand Mrs. Kilu's actions. She came into the corridor in her home and found a man inside who was obviously a stranger. At no time did this man account for himself, either to indicate that he was interested in accommodation, or that he was an investigating officer of the Ontario Human Rights Commission. When she requested that he leave, he held his ground. Instead of leaving the house as she requested, he proceeded to go to the second floor to make inquiries. Instead of accounting for himself, who he was, and why he was there, he insisted on knowing who Mrs. Kilu was.

In these difficult conditions, in what must have been for her very tense circumstances (all of which, according to Mr. Dobson's own testimony lasted about five minutes), he concluded on the basis of some replies to his questions that Mrs. Kilu understood English adequately, was lying to him deliberately, and should therefore be ignored.

Whether she was a cleaning woman, or the landlady, when she requested that he leave, I feel that he should have done so or identified himself. His failure to leave at that time, or at least to give an adequate explanation of who he was and what he wanted to do, resulted in the events of that day, and the subsequent day, being too highly charged with emotion and, if not wholly justified, at least understandable. These events do not provide me with any assistance in believing or disbelieving the motivation of Mr. and Mrs. Kilu in denying the accommodation to Mr. Penniecook.

At the same time, I must say that subsequently, having been informed of Mr. Dobson's position, the Respondents did not give him that cooperation which one could expect from someone who had a perfectly good explanation to give. Their treatment of Mr. Penniecook, without the explanation they provided at the hearing to me, was such as to lead to a strong suspicion of discriminatory motive. The circumstances were sufficiently suspicious to require an explanation.

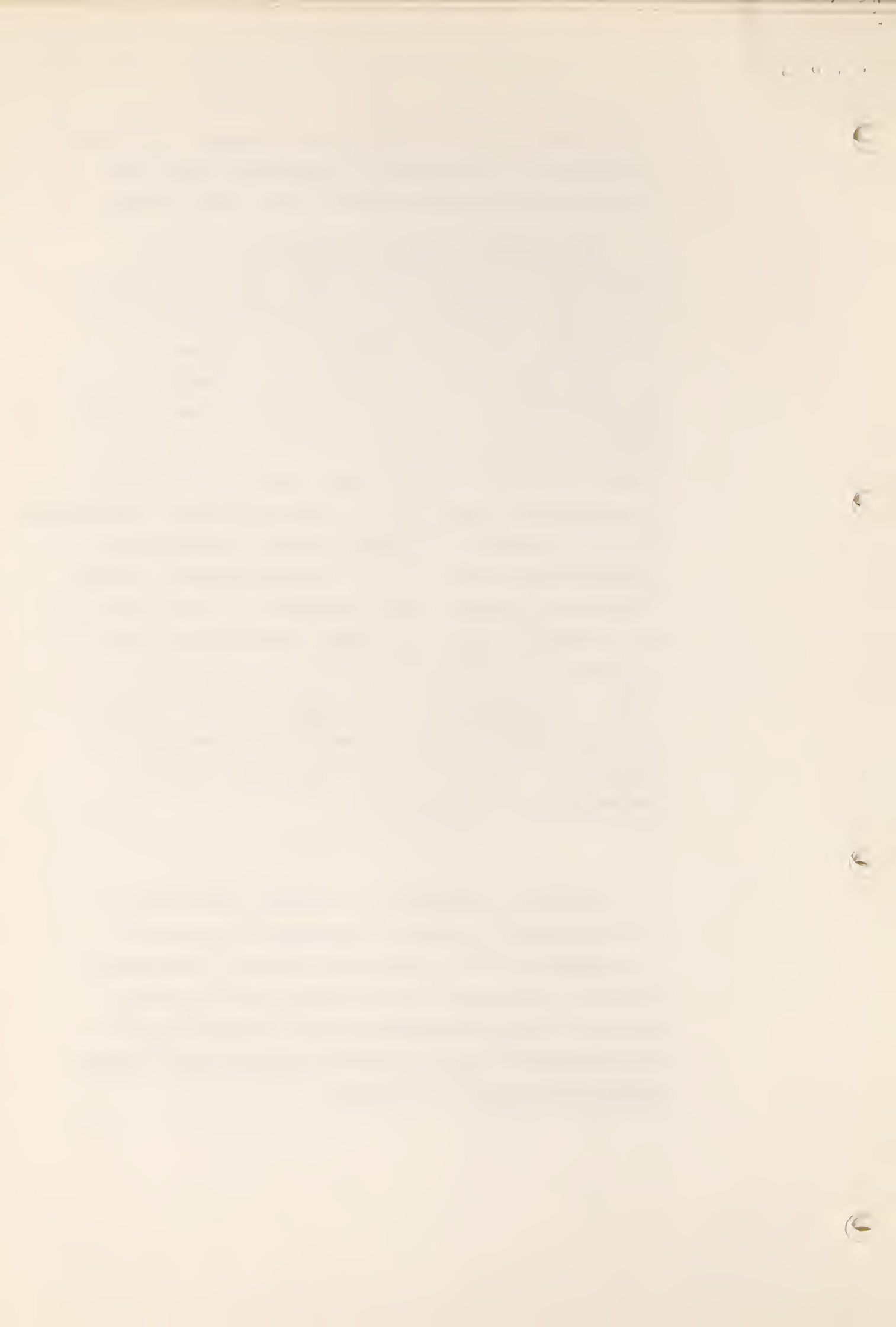
It is necessary to refer to the matter of the language difficulty. We are living in a country in which knowledge of the English and/or French languages is highly desirable and, except in exceptional circumstances, a condition for obtaining citizenship. It is true that there are many people

living happily in this country whose knowledge of the official languages may not be adequate to communicate fully with a university-educated person such as a Human Rights officer is.

Nevertheless, I should have thought that in the circumstances of this case there was at least some obligation on the part of people who do have such a language difficulty to arrange for their own interpretation. They acted in a way which could lead to the suspicion that a breach of the law had been committed. Interpretation could have been provided freely by their son and daughter-in-law. In this case, I think there must be some obligation upon Mr. and Mrs. Kilu to have received greater help from their children in understanding what the investigation was about, and what the subsequent discussions were about. One can well understand Mr. Dobson's frustrations in being told by the Kilus, Sr., that they could not understand English well enough; and then being told by the Kilus, Jr., that interpretation was not required as the Kilus, Sr., could cope with the English language. In fact, some contradictions could very well have induced him to be suspicious of the motives of the Respondents in denying accommodation to the Complainant.

* * * * *

In all the circumstances, I find that the evidence is not sufficient to lead me to conclude that the denial of accommodation to the Complainant was for a discriminatory purpose. To the extent that there may be some suspicion because of the way the Complainant was treated, there is a counterbalance in the uncontradicted evidence that "coloured people" were tenants of the Kilus.



I recognize that one of the unfortunate facts of life is that there are people who distinguish between gradations of colour and who, although prepared to rent accommodations to a brown-skinned person, may not do so to someone who may be described as "more black". Further, there is no question but that there are some people who will not discriminate against those of Asiatic origin, while yet discriminating against those of African origin. Nevertheless, a man who lived at the Kulu premises for about seven years in the 1950's testified on their behalf that they made no distinction on the basis of race or nationality and that there were "coloured" tenants at the Kulus. Furthermore, the uncontradicted evidence of Mr. Kulu, Jr., is that at least one lady, who was darker than Mr. Penniecook, and who came from the Caribbean area, had been a tenant at the Kulu residence.

A great deal of time was spent on the question of whether a brother and sister who were described as "coloured people from Jamaica" were of Chinese origin, or some other. No evidence was presented to me that in fact this brother and sister were of Chinese origin, and no other race. Although the name would seem to be a Chinese name, it is quite possible in a country such as Jamaica, where there is a great deal of inter-marriage and racial mixing, that the brother and sister in this case might have had ancestry which was other than Chinese, or a mixture of ancestry which might be Asiatic, African, and European.

It is possible to conclude from the evidence that to the Respondents everyone who is not white is "coloured". But there was nothing to indicate merely because of this that they did, or did not, make any discriminatory distinction on the basis of



gradation of colour. And, may I repeat, there was uncontradicted testimony that at least four, and possibly more of the Kulu tenants, past and present, were "coloured".

If there was reason to believe that selective discrimination was being practised, this should have been better investigated. The facts concerning the individuals, i.e., coloured? Chinese? black? mixed? etc. should have been followed up. It maybe that there is a shortage of Commission staff to investigate such cases as this thoroughly. If so, more should be hired. It is not conducive to government-citizen harmony for incomplete investigations to occur.

* * * * *

In all the circumstances I conclude that the allegation if discrimination in the denial of accommodation to Mr. Penniecook has not been proved.

At the same time, it must be pointed out that the contradictory statements received by the Commission as to the ability of the Respondents to communicate in English, as well as the contradictory statements made about the availability of the accommodation could well have lead the Commission to feel that without a complete hearing, at which individuals testify upon oath, the Commission could not on its own refuse Mr. Penniecook's request for an inquiry into this complaint. From the point of view of Mr. Penniecook, the contradictory statements about the availability of the accommodations could well have led him to conclude that he was denied accommodation because of discriminatory purpose. I feel that there has been a rather unfortunate series of incidents on both sides.

Therefore, I recommend that a letter of apology be sent from the Commission to Mr. and Mrs. Kilu to apologize for the manner in which the complaint was investigated. I make this recommendation conditional upon a letter from Mr. and Mrs. Kilu to Mr. Penniecook apologizing for the brusque way in which he was treated, assuring him that this was not as a result of discriminatory intent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



W. S. Tarnopolsky.

July 13th, 1970.

